Order 96-5-27

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

SERVED: May 21, 1996

Issued by the Department of Transportation
on the 20th day of May, 1996

Joint Application of **UNITED AIR LINES, INC.** **and** **DEUTSCHE LUFTHANSA, A.G.** **d/b/a** **LUFTHANSA GERMAN AIRLINES** **for approval of and Antitrust Immunity for an Alliance Expansion Agreement pursuant to 49 U.S.C. §§ 41308 and 41309**	**Docket OST-96-1116**

FINAL ORDER

By this Order, we grant final approval and antitrust immunity for an Alliance Expansion Agreement ("the Expansion Agreement"),[1] between United Air Lines, Inc. ("United"), and Deutsche Lufthansa, A.G. d/b/a Lufthansa German Airlines ("Lufthansa") pursuant to 49 U.S.C. §§ 41308 and 41309, subject to the provisions that the antitrust immunity will not cover any activities of United and Lufthansa as owners of Apollo/Galileo and Amadeus/START, and subject to the limits and conditions indicated in Appendix A. We direct United and Lufthansa to resubmit the Expansion Agreement five years from the date of the issuance of this Order. If United and Lufthansa choose to operate under a common name or brand, they must obtain separate approval from the Department before implementing the arrangement.

We also direct United and Lufthansa to withdraw from participation in any International Air Transport Association (IATA) tariff coordination activities that

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1 The term "Alliance Expansion Agreement" as used herein means the following agreements between the joint applicants: (1) the agreement entered into on January 9, 1996; which incorporates their agreement dated October 3, 1993, which remains in full force and effect; (2) any implementing agreements that the joint applicants conclude pursuant to the January 9, 1996, agreement to develop and carry out the United and Lufthansa alliance; and (3) any subsequent agreement(s) or transaction(s) by the joint applicants pursuant to the foregoing agreements.

discuss any proposed through fares, rates or charges applicable between the United States and Germany, the United States and the Netherlands, and/or the United States and any other countries whose designated carriers participate in similar agreements with U.S. airlines that are subsequently granted antitrust immunity or renewal thereof by the Department. We further direct Lufthansa to report full-itinerary Origin-Destination Survey of Airline Passenger Traffic for all passenger itineraries that include a United States point (similar to the O&D Survey data already reported by its alliance partner United).

We also grant the separate Rule 39 motions filed by United and Lufthansa.

I. BACKGROUND

A. The Application

On February 29, 1996, United and Lufthansa filed a request seeking approval of and antitrust immunity for the Expansion Agreement, for a five-year term. Through their Expansion Agreement, the joint applicants state that they intend to broaden and deepen their cooperation in order to improve the efficiency of their coordinated services, expand the benefits available to the traveling and shipping public, and enhance their ability to compete in the global marketplace. Although the joint applicants state that they will continue to be independent companies, they maintain that the objective of the Expansion Agreement is to enable the airlines to plan and coordinate service over their respective route networks as if there had been an operational merger between the two companies.[2]

B. Rule 39, Confidential Information

On February 29, 1996, United submitted certain additional documents and information in connection with the application and a motion under 14 C.F.R. 302.39 and 49 U.S.C. § 40115 requesting confidential treatment for these documents. Additionally, on March 11, 1996, in response to a request by Department staff, Lufthansa filed supplementary information in connection with the application and a similar motion for confidential treatment of these data.

In regard to these submissions, the movants claimed that the material is protected from public disclosure under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(3) (4), which protects from disclosure information that is "(1) commercial or financial, (2) obtained from a person outside the government, and (3) privileged or confidential."[3] The applicants

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[2] By Order 96-3-26, issued March 13, 1996, we found that the record of this case was substantially complete, and established procedural deadlines.

[3] United's motion, at 2; and Lufthansa's motion, at 4.

contend that the submitted information and data are within exemption 4 of FOIA because the documents contain "proprietary and highly commercially sensitive" information regarding United's and Lufthansa's business plans and analyses, are not generally released to the public, and, if released, would cause substantial harm to the competitive positions of United and Lufthansa.

By Order 96-3-26, issued March 13, 1996, the Department deferred action on the joint applicants' motions for confidential treatment of these data and documents, while limiting access to the information to counsel and outside experts who represent interested parties in this case. The Order provided that authorized parties could obtain access to the documents upon signing affidavits promising to preserve the confidentiality of the information and to use the information only for the purpose of participating in this proceeding.

No answers were filed regarding the applicants' motions.

C. Show Cause Order

On May 9, 1996, the Department issued a Show-Cause Order, Order 96-5-12. We tentatively determined, subject to certain conditions and limitations, to grant approval of and antitrust immunity for the Expansion Agreement between United and Lufthansa. We tentatively decided to direct United and Lufthansa to resubmit their Expansion Agreement five years from the date of issuance of the final order in this case. The Department noted that it was not proposing to authorize United and Lufthansa to operate under a common name. The Department determined that, if United and Lufthansa choose to operate under a common name, they will have to obtain prior separate approval from the Department before implementing the arrangement.

We also tentatively decided to exclude certain matters relating to fares and capacity for particular categories of U.S. point-of-sale local passengers on the Chicago-Frankfurt and Washington, D.C.-Frankfurt routes, as agreed between the applicants and the Department of Justice (DOJ).[4] We tentatively determined to direct United and Lufthansa to withdraw from all International Air Transport Association (IATA) tariff coordination activities affecting through prices between the United States and Germany and for other markets described below. We tentatively decided to direct Lufthansa to report full-itinerary Origin-Destination Survey of Airline Passenger Traffic (O&D Survey) data for all passengers to and from the United States (similar to the O&D Survey data reported by United). Further, we tentatively determined to

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[4] The Department intends to, in cooperation with the DOJ, review this condition within eighteen months to determine whether it should be discontinued or modified. *See* Appendix A, at 3.

direct the joint applicants to file all subsidiary and or subsequent agreement(s) with the Department for prior approval.

We also provided the applicants and any interested party an opportunity to comment on our tentative findings and conclusions.

D. Responsive Pleadings to Order to Show Cause

On May 16, 1996, American Airlines, Inc. ("American"), the International Air Transport Association ("IATA"), and the joint applicants filed comments/objections. The parties do not challenge our analysis of the competition in four relevant markets, *i.e.*, the U.S.-Europe market, the U.S.-Germany market, the city-pair markets, and the behind and beyond-gateway markets. They do not dispute our finding that the Agreement will benefit the public by enabling the joint applicants to provide better service and to operate more efficiently. The parties also do not challenge our analysis and findings with regard to sections 41308 and 41309.

1. American

American asserts that the United and Lufthansa application should not be approved ahead of the request for antitrust immunity filed by American and Canadian Airlines International Ltd. American also maintains that the Department should not approve the application until "Lufthansa has agreed to discontinue the various practices which it, and its related companies, have used to effectively block the entry of U.S. CRSs [computer reservation systems] into the German distribution market."[5] They also request that the Department obtain assurances from the German Government that it will take the "necessary remedial steps to eliminate the multiple CRS barriers which have long existed in Germany," before granting immunity to the joint applicants.[6]

2. IATA

IATA believes that the limitation imposed by Order 96-5-12 regarding participation in IATA tariff conferences is "unsupported by the record, inconsistent with the Order's analysis of the relevant markets and contrary to the public interest." IATA

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5 Objections of American, at 2.

6 *Id*.

argues that the imposition of tariff coordination limitations is unsupported because (1) no party to the proceeding advocated any condition affecting IATA tariff coordination; (2) the record of this case provides no evidence that tariff coordination is anticompetitive; (3) the record does not support our contention that "potential competition will, on balance, outweigh any potential anti-competitive effects of price coordination within the Alliance itself;"[7] (4) Order 96-5-12 does not sufficiently address the legitimate concerns of smaller international airlines and their governments regarding how the proposed condition would affect interlining; and (5) the various affected airlines and their respective governments have not had sufficient time to respond to Order 96-5-12, thus finalizing the proposed IATA condition would "jeopardize their legitimate interests without affording them a realistic opportunity to be heard."

3. United, Lufthansa, and their respective subsidiaries

The joint applicants request that the Department clarify in its Final Order that the Department's approval of and antitrust immunity for the Expansion Agreement extend to include the joint applicants' respective corporate subsidiaries, consistent with the Expansion Agreement.[8]

E. Answers to Responsive Pleadings

1. On May 17, 1996, the City and County of Denver filed an answer in response to the objections of American Airlines, Inc. The City states that it supports the joint applicants' application. The City maintains that implementation of the Expansion Agreement by the joint applicants will (1) provide increased European service for Denver travelers, (2) provide the City with enhanced service options, and (3) strengthen competition in the markets that the joint applicants serve. The City also disagrees with American's view that the Department should delay acting on the joint application.

2. On May 20, 1996, the joint applicants filed an answer. United and Lufthansa reiterate their previous arguments and urge the Department to issue a Final Order.[9]

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7 Response of IATA, at 4, *quoting* Order 96-5-12, at 28.

8 We note that Article 4.9 of the Expansion Agreement provides for the harmonization and integration of cargo services. The joint applicants state that Lufthansa currently provides cargo services entirely through its wholly-owned and specially-controlled subsidiary, Lufthansa Cargo, A.G. (*See* Notice of Action Taken dated March 29, 1996, Docket OST-96-1156). Currently, United does not have any airline subsidiaries (Joint Comments, at 3). We will accordingly include "subsidiaries" as provided in ordering paragraph 1.

9 The joint applicants take no position on IATA's requests.

II. DECISION SUMMARY

We make final our tentative findings that the Expansion Agreement should be approved and its parties given antitrust immunity, subject to (1) the provisions that the antitrust immunity will not cover any activities of United, Lufthansa, and their respective subsidiaries as owners of Apollo/Galileo and Amadeus/ START computer reservations systems businesses; (2) the Joint Applicants' withdrawal from IATA functions as described below; and (3) the described conditions as agreed to by DOJ and the applicants, for the Chicago and Washington, D.C.- Frankfurt, Germany markets (*see* Appendix A). The commenting parties have not raised any new arguments that would justify our changing our tentative findings, nor have they refuted the public benefits inherent in approving and granting antitrust immunity or our competition analysis of the U.S.-Europe, U.S.-Germany, or specific city-pair markets, or of the behind- and beyond-gateway markets. United and Lufthansa are to resubmit for renewal their variously styled expansion agreement(s) in five years from the date of the issuance of this order. If United and Lufthansa choose to operate under a single name or common brand they will have to obtain prior approval from the Department before implementing the change. We also direct the joint applicants to file all subsidiary and subsequent agreement(s) with the Department for prior approval.[10]

In addition, we are also finalizing our determinations (1) directing the applicants to withdraw from all International Air Transport Association (IATA) tariff coordination activities relating to through prices between the United States and Germany, as well as between the United States and the homeland(s) of foreign carriers participating with U.S. carriers in other immunized alliances; and (2) directing Lufthansa to report full-itinerary O&D Survey data for all passenger itineraries that contain a United States point (similar to the O&D Survey data already reported by United).

Finally, we grant confidential treatment to the supplementary information and data submitted by the joint applicants on February 29 (United) and March 11 (Lufthansa).

III. DECISIONAL STANDARDS UNDER 49 U.S.C. §§ 41308 and 41309

A. Section 41308

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[10] Regarding this requirement, we do not expect the alliance partners to provide the Department with minor technical understandings that are necessary to fully blend their day-to-day operations but that have no additional substantive significance. We do, however, expect and direct the joint applicants to provide the Department with any contractual instruments that may materially alter, modify, or amend the Alliance Expansion Agreement.

We have the discretion to grant antitrust immunity to agreements approved by us under section 41309 if we find that the immunization is required by the public interest. It is not our policy to confer antitrust immunity simply on the grounds that an agreement does not violate the antitrust laws. We are willing to make exceptions, however, and thus grant immunity if the parties to such an agreement would not otherwise go forward without it, and we find that grant of antitrust immunity is required by the public interest.

B. Section 41309

Under 49 U.S.C. Section 41309, the Department must determine, among other things, that an intercarrier agreement is not adverse to the public interest and not in violation of the statute before granting approval.[11] The Department cannot approve an intercarrier agreement that *substantially* reduces or eliminates competition unless the agreement is necessary to meet a serious transportation need or to achieve important public benefits that cannot be met, and those benefits cannot be achieved by reasonably available alternatives that are materially less anticompetitive.[12] The public benefits include international comity and foreign policy considerations.[13]

The party opposing the agreement or request has the burden of proving that it substantially reduces or eliminates competition and that less anticompetitive alternatives are available.[14] On the other hand, the party defending the agreement or request has the burden of proving the transportation need or public benefits.[15]

IV. DISCUSSION

A. Approval of the Agreement

In the Show-Cause Order we described the antitrust analysis required by section 41309. We found that the relevant markets were the U.S.-Europe, the U.S.-Germany, and various city-pair markets, as well as the behind- and beyond-gateway markets. Our analyses indicated that implementation of the Expansion Agreement would not

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11 Section 41309(b).

12 Section 41309(b)(1)(A) and (B).

13 Section 41309(b)(1)(A).

14 Section 41309(c)(2).

15 *Id.*

reduce competition in the U.S.-Europe, U.S.-Germany, and behind- and beyond-gateway markets.

Regarding the city-pair markets, the applicants undertook to exclude from the scope of their requested immunity capacity, fares, and yield management decisions for particular U.S.-source local passengers in the only two markets where both applicants operate their own flights, the Chicago-Frankfurt and Washington, D.C.-Frankfurt markets, consistent with Appendix A.

As to the other twelve city-pair markets,[16] we found that there were no barriers to entry and that no party had argued to the contrary. We noted that the recent and planned entry by other U.S. airlines into U.S.-Germany markets confirmed our tentative finding that entry is both possible and likely, notwithstanding the applicants' large market share.

No party has challenged these findings. We will make them final. In addition, none of the parties challenge our tentative conclusion that the Expansion Agreement is consistent with the public interest under sections 41308 and 41309. Specifically, none of the parties dispute that the Expansion Agreement will benefit the public with better service and more efficient United / Lufthansa operations.

B. Antitrust Immunity

We finalize our findings that antitrust immunity is required in the public interest and that United and Lufthansa are unlikely to proceed with the Expansion Agreement absent the immunity. Accordingly, we grant antitrust immunity to the Expansion Agreement.

Approval under section 41309 requires that an agreement not be adverse to the public interest. Granting antitrust immunity under section 41308 requires that the exemption is required by the public interest. It is not our policy to confer antitrust immunity simply on the grounds that an agreement does not violate the antitrust laws. We are willing to make exceptions, however, and thus grant immunity if the parties to such an agreement would not otherwise go forward without it, and we find that grant of antitrust immunity is required by the public interest.

We have found that the Expansion Agreement will not substantially reduce or eliminate competition, as limited, conditioned, and agreed to by DOJ and the joint applicants (*see* Appendix A). It is unlikely that the integration of the joint applicants' services would be found to violate the antitrust laws. However, since the

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16 Atlanta-Frankfurt, Boston-Frankfurt, Chicago-Düsseldorf, Chicago-Munich, Dallas/Ft. Worth-Frankfurt, Houston-Frankfurt, New York-Düsseldorf and Frankfurt, Los Angeles-Frankfurt, Miami-Frankfurt, Newark-Frankfurt, and San Francisco-Frankfurt.

joint applicants will be ending their competitive service in some markets, they could be exposed to liability under the antitrust laws if we did not grant immunity.[17] Based on the above, we found that United and Lufthansa are unlikely to proceed with the Expansion Agreement without immunity. No party to this proceeding has disputed these findings.

C. IATA Tariff Coordination Issue

The International Air Transport Association (IATA) has filed a response to Order 96-5-12 objecting to the proposal to condition our approval of and grant of antitrust immunity to the Alliance Agreement upon the withdrawal by the joint applicants from IATA tariff coordination activities affecting through prices between the U.S. and Germany, and between the U.S. and any other country that has designated a carrier whose alliance with a U.S. carrier has been or is subsequently given immunity by us.

IATA contends that the proposed condition is unsupported by the record in this proceeding, is inconsistent with the Department's analysis of competition in the relevant markets in Order 96-5-12, is contrary to the public interest, and is an action that should be considered only in the context of IATA's application for renewal of its Traffic Conference antitrust immunity in Docket 46928.

We are not persuaded by these arguments and will therefore finalize the condition as proposed.

IATA makes several specific arguments directed to the general proposition, which it advanced also in its earlier comments in this proceeding, that the proposed condition should be considered in Docket 46928 rather than here. First, IATA asserts that since "no party" to this proceeding suggested a condition affecting IATA tariff coordination, nor was such a condition advocated by the Department of Justice in its review of the application or discussed by the U.S. in its recent bilateral negotiations with Germany, the many carriers and foreign governments that filed comments in support of IATA tariff coordination in Docket 46928 have had no "meaningful opportunity" to comment on the proposed condition or its implications for them. However, responding to the Order to Show Cause is not the first opportunity all potentially interested parties have had to comment on the issue, which IATA has characterized as one of "general significance." The Department itself raised the issue of whether antitrust immunity granted to carrier alliances should affect their participation in IATA tariff coordination over seven months ago in connection with the Delta Alliance application.[18] IATA filed comments in that proceeding on

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17 Order 96-5-12, at 19-20.

18 Order 95-9-27, issued September 25, 1995, in Docket OST-95-618.

November 13, 1995, and in this proceeding on April 3, 1996, raising many of the same objections it is making now.[19] Moreover, the alliance applications before us have elicited extensive interest in the worldwide aviation community. It is therefore difficult to see how IATA members or other potentially interested parties have been denied adequate notice or an opportunity to be heard on this issue. Apart from IATA, no general or specific objections to our proposed condition have been filed in this docket.[20]

IATA also contends that the proposed condition "prejudges" a number of important issues being actively considered in Docket 46928, including the economic and political implications of carrier alliances and their impact on IATA tariff coordination,[21] whether IATA tariff coordination undermines competition in transatlantic markets,[22] and whether IATA tariff coordination is important to ensure that all carriers are able to participate in interline agreements.[23] While it is certainly true that such issues have been raised and are being considered in Docket 46928 in connection with the basic question of whether general Tariff Conference immunity should be maintained, the focus of this proceeding, and of other proceedings to consider similar applications for antitrust immunity for carrier alliances, is quite different.

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19 IATA's initial comments in this docket were considered and addressed by the Department in Order 96-5-12. In addition, Delta and its alliance partners commented on the issue in Docket OST-95-618; their comments, along with IATA's, will be considered in that proceeding.

20 The Joint Applicants in this docket have filed an answer to Order 96-5-12, expressly taking "no position on IATA's requests." The Joint Applicants request, however, that if paragraph 3 of Order 96-5-12 is finalized, the withdrawal be stated as a general requirement rather than a specific condition on the Alliance's immunity, citing the Northwest-KLM order as precedent and its concern that compliance with the condition could become an issue in a private antitrust lawsuit. Because of the direct connection between the condition and the Alliance immunity being granted, an issue not addressed in the Northwest-KLM proceeding, the Department has proposed and will finalize our action as a specific condition. Our ability to resolve questions of its application in advance, explained below, should allay the Joint Applicants' litigation concerns.

21 IATA Response, at 2 n.2.

22 ***Id.*** at 4 n.4.

23 *Id.* at 5 n.7.

Here, as noted, we are considering the issue of whether and to what extent participation in IATA price coordination by the Joint Applicants continues to be in the public interest, should we grant them the broad antitrust immunity they have requested to permit a full integration of their operations and marketing. As indicated in Order 96-5-12, the issue of competition between the alliance and other carriers, particularly other alliances, is pressed upon us by the need to mitigate the potential anticompetitive effects of the immunity provided for the alliance's internal integration and to make it as likely as possible that the economic efficiencies of the alliance can be passed on to consumers. This issue, as well as related questions of comity and reciprocity affecting the relevant markets, are particular to and necessary for the resolution of the applications before us, and are not suitable for resolution in Docket 46928. Nor do they prejudge the issues in that proceeding, which does not involve the impact of "dual" immunity. Contrary to IATA's assertion, our adoption here of the proposed condition restricting IATA tariff coordination in certain markets**,** following notice and an opportunity for all interested parties to comment on the condition, is not "an improper circumvention of the orderly five-year review procedure the Department itself put in place by Order 85-5-32.[24]

IATA's assertion that our condition is unsupported by the record reflects an apparent misunderstanding of the basis for the Department's decision to extend IATA's Traffic Conference immunity in Order 85-5-32. IATA claims that there is no evidence for our finding in Order 96-5-12 that IATA tariff coordination will undermine potential price competition among competing immunized alliances in transatlantic markets. The predicate for that tentative finding is the Department's determination in Order 85-5-32 that "agreements among members of IATA establishing conferences within which carriers may negotiate fares and rates to be charged for the provision of international air transportation services substantially reduce competition."[25] Further, every Department order since then approving an individual IATA agreement, of which hundreds have been filed, has repeated the finding of Order 85-5-32 that the IATA tariff conference machinery is

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24 *Id*. at 1. By Order 85-5-32, issued May 6, 1985, the Department found IATA's amended tariff coordination procedures to be anticompetitive, but nevertheless approved and immunized them on a worldwide basis on foreign policy and comity grounds. While the order required IATA to resubmit its Traffic Conference procedures in five years so that the Department could fulfill its statutory obligation to make certain that any immunity granted continued to be justified, the order also expressly reserved the right to review the Department's approval and immunity at any time, subject to notice and an opportunity for comment, to "allow us to address changed circumstances in the international air transportation industry quickly, should they occur."

25 Order 85-5-32, issued May 6, 1985, at 2.

anticompetitive. IATA has presented no evidence or specific arguments in this proceeding that the Department's tentative finding is invalid.

Similarly, IATA argues that the Department's tentative finding on the need for competition outside of IATA in at least some markets is inconsistent with other findings in Order 96-5-12 that the joint applicants compete on the basis of price in certain U.S.-Germany markets, that the U.S.-Germany and U.S.-Europe markets are highly competitive, that the immunized Northwest-KLM alliance has benefited consumers, and that the United-Lufthansa alliance will not adversely affect competition.[26] IATA's references overlook the conditions imposed and the qualifications placed on such findings by the Department in the order, as well as the fact that the Alliance participants will cease competing with each other on price in the markets covered by the immunity granted for internal Alliance coordination. IATA would like to emphasize the degree to which it is not an effective pricing cartel, but our statute requires a recognition of the degree to which it may be, particularly where, as here, we see a need to mitigate the effects of potentially anticompetitive alliance immunity.

IATA argues that the scope of our proposed condition is not supported by our tentative findings on the need and potential for price competition between the Alliance and other carriers and alliances. IATA objects to the scope of the condition to the extent that it would require withdrawal of Alliance participants from IATA tariff coordination in certain markets where they may not operate services. However, the fact that the Alliance carriers may not operate their own services in each covered market of other alliances is not determinative of the degree of actual and potential competition they would provide in such markets. We believe that existing competition between transatlantic services and gateways, coupled with the potential for new competing services under market-oriented regimes, amply justifies the scope of our condition. As noted, we have acted to ensure that actual and potential competition in such markets will not be hobbled by Alliance participation in IATA tariff coordination activities. IATA has given us no sound basis for believing that our condition as defined is an inappropriate balance among public interest factors, including our interests in protecting U.S. consumers, encouraging service and price competition, and recognizing diverse foreign policy interests.

Finally, IATA contends that Order 96-5-12 addresses only in the most "perfunctory" manner the concerns of smaller international carriers and their governments regarding the importance of IATA tariff coordination to interline participation, as stated in numerous comments filed in Docket 46928. According to IATA, many such carriers believe that IATA tariff conferences enhance their ability to design and implement joint fares which permit them to compete on an interline basis in through markets. However, IATA has not directly contested our tentative findings that

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26 IATA Response, at 3.

participation in interline agreements is not dependent on IATA membership or participation, and that such agreements would not be affected by our condition. In this context, we note that at the present time Delta, Northwest and United are the only U.S. carriers that participate in transatlantic tariff coordination through IATA; American Airlines, Continental, TWA, USAir and Tower do not, although they generally have extensive interline relationships with numerous international carriers. Moreover, applying our condition to U.S.-homeland markets of alliance carriers should prove to be no detriment to the smaller international carriers, since their interline needs exist primarily in markets beyond the alliance homelands, where alliance participation in IATA tariff coordination is not precluded.

In conclusion, we note that IATA has not challenged our description in Order 96-5-12 of how our condition would be implemented, and we will accordingly make that description final. However, it is possible that some questions may arise in the future regarding the implementation of our condition. To resolve such questions efficiently, we will herein delegate authority to the Director, Office of International Aviation, to provide guidance on the implementation of the condition consistent with the scope set forth in Order 95-5-12.

D. O&D Survey Data Reporting Requirement

No party opposes the imposition of an Origin-Destination Survey of Airline Passenger Traffic (O&D Survey) reporting requirement. However, to further ensure that our grant of antitrust immunity does not lead to anticompetitive consequences, we have decided to grant confidentiality to Lufthansa's Origin-Destination report and special report on code-share passengers. Currently, we grant confidential treatment to international Origin-Destination data. We provide these data confidential treatment because of the potentially damaging competitive impact on U.S. airlines and the potential adverse effect upon the public interest that would result from unilateral disclosure of these data (data covering the operations of foreign air carriers that are similar to the information collected in the Passenger O&D Survey are generally not available to the Department, to U.S. airlines, or to other U.S. interests).

14 C.F.R. Part 241 section 19-7(d)(1) provides for disclosure of international Origin-Destination data to *air carriers* directly participating in and contributing to the O&D Survey. While we have found it appropriate to direct Lufthansa to provide certain limited Origin-Destination data to the O&D Survey, we have determined that Lufthansa is not an air carrier within the meaning of Part 241. 14 C.F.R. Part 241, Section 03 defines an air carrier as "[a]ny citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation." Lufthansa accordingly will have no access to the data filed by U.S. air carriers. Moreover, we are making Lufthansa's submissions

confidential while maintaining the current restriction on access to U.S. air carrier Origin-Destination data by foreign air carriers.

E. CRS Participation Issue

In their initial responses to the application filed by United and Lufthansa, American and TWA complained that some major German travel suppliers affiliated with Lufthansa were refusing to participate in the computer reservation systems (CRSs) affiliated with American and TWA (Sabre and Worldspan, respectively), in order to deter German travel agencies from subscribing to those systems. Since the German travel agencies allegedly could obtain adequate information and booking capabilities on these travel suppliers only by subscribing to Amadeus and START, the CRSs affiliated with Lufthansa, the agencies could not practicably use Sabre or Worldspan.

We tentatively decided in our show-cause order that we should not impose conditions on our approval and immunity for the alliance as a result of these complaints. We continue to be seriously concerned with conduct by foreign airlines and their affiliates that denies U.S. CRSs a reasonable opportunity to compete in foreign CRS markets, with consequent effects on airline competition. In this case, however, the travel suppliers' decisions on CRS participation were not sufficiently related to the grant of antitrust immunity requested by United and Lufthansa, and there are other fora that offer appropriate redress for the complaints by American and TWA. As we noted, however, we are prepared to take action against foreign airlines that directly or through an affiliate own a CRS and refuse to participate in a competing U.S. system at an adequate level, thereby denying the U.S. airline a reasonable opportunity to market its system to travel agencies in the foreign airline's homeland.

American's response to our show-cause order again asserts that we should take action in this proceeding to protect Sabre's ability to compete in the German market. American urges us to withhold the grant of antitrust immunity until the German government has assured us that it will eliminate what American states are the barriers to CRS competition created by German Rail and other firms affiliated with Lufthansa.

While we support American's efforts to create fair competition in the German CRS market, we are unwilling to impose the condition proposed by American. As we stated before, there is no sufficiently related or direct link between the alleged refusals to participate in Sabre by German Rail and other German travel firms, on the one hand, and the request by United and Lufthansa for antitrust immunity, on the other. American has not shown that the applicants' integration plans have any relationship with the alleged unfair conduct of the German travel suppliers. However, the United States government is concerned about the ability of U.S. CRSs

to compete in the German market and will take appropriate action to secure a fair opportunity for U.S. systems to compete in foreign markets.

F. Operation under a Common Name/Consumer Issues

We affirm our directive that if United and Lufthansa choose to operate under a common name or use "common brands", they must obtain prior approval from the Department prior to such operation.

G. Rule 39, Confidential Information

Rule 39 instructs us to evaluate requests for confidential treatment in accordance with the standards of disclosure found in the Freedom of Information Act (5 U.S.C. § 552). Information may be withheld from the disclosure under 5 U.S.C. § 552(b)(4) if it is (1) commercial or financial, (2) obtained from a person outside of government, and (3) privileged or confidential.[27]

The information for which confidential treatment is sought is financial or commercial in nature and was obtained from a person outside the government. The remaining question is whether the information is privileged, or confidential -- whether "disclosure of the information is likely to have either of the following effects: (1) impair the Government's ability to obtain necessary information; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained."[28] Further, to be privileged or confidential, the information must not be the type that is usually released to the public.[29]

We have reviewed the documents that are the subject of the Rule 39 motions filed on February 29, 1996, by United and on March 11, 1996, by Lufthansa. With a few exceptions, we find that the documents are within exemption 4 of FOIA, 5 U.S.C. §552(b)(4). We find that the information is commercially sensitive and would normally be treated as confidential, and that public release of the information would have an adverse financial and commercial impact on the joint applicants and would place the joint applicants at a competitive disadvantage. Therefore, we grant confidential treatment to these documents, information, and data. The material for which we are not granting confidential treatment is already public and therefore

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27 Gulf and Western Industries, Inc. v. United States, 615 F.2d 527, 529 (D.C. Cir 1979).

28 National Parks and Conservation Association v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).

29 Gulf and Western Industries, Inc. v. United States, 615 F.2d 527, 530 (D.C. Cir 1979).

must be disclosed. The applicants must furnish copies of the non-withheld material for the public docket, as described in Appendix B.

V. SUMMARY

We make final our approval and grant of antitrust immunity to the Expansion Agreement, as conditioned in Appendix A. The grant of antitrust immunity does not cover United's and Lufthansa's interests in Apollo/Galileo and Amadeus/START, respectively. In addition, we affirm our directive that United and Lufthansa resubmit the Expansion Agreement five years from the date of the issuance of the final order. Notwithstanding our final determination, if United and Lufthansa choose to operate under a common name, they will have to seek separate approval from the Department before implementing the change.

Furthermore, we affirm our determinations regarding the joint applicants participation in IATA tariff coordination activities, as fully described below. We direct Lufthansa to report O&D Survey data as defined in this order. We also direct United and Lufthansa to submit any subsidiary agreement(s) to the Expansion Agreement for prior approval (*see* footnote 10). We will also clarify our order so that it will encompass the operations of any United and Lufthansa subsidiary.

Finally, we grant United's and Lufthansa's motions for confidential treatment, as discussed above.[30]

ACCORDINGLY:

1. We approve and grant antitrust immunity to the Alliance Expansion Agreement between United Air Lines, Inc. and Deutsche Lufthansa, A.G. d/b/a Lufthansa German Airlines, and their subsidiaries,[31] insofar as it relates to foreign air transportation, subject to the provisions that the antitrust immunity will not cover any activities of United and Lufthansa as owners of Apollo/Galileo and Amadeus/START computer reservation systems businesses, and subject to the limits and conditions indicated in paragraph 3, below, and in Appendix A hereto;

2. We direct United Air Lines, Inc. and Deutsche Lufthansa, A.G. d/b/a Lufthansa German Airlines, and their subsidiaries, to resubmit their Alliance Expansion Agreement five years from the date of issuance of the final order in this case;

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30 United's Rule 39 motion filed on February 29, 1996, and Lufthansa's Rule 39 motion filed on March 11, 1996.

31 The U.S.-Germany operations of Lufthansa's subsidiary, Lufthansa Cargo, A.G., are delineated by Notice of Action Taken dated March 29, 1996, Docket OST-96-1156.

3. We direct United Air Lines, Inc. and Deutsche Lufthansa, A.G. d/b/a Lufthansa German Airlines, and their subsidiaries, to withdraw from participation in any International Air Transport Association (IATA) tariff coordination activities that discuss any proposed through fares, rates or charges applicable between the United States and Germany, the United States and the Netherlands, and/or the United States and any other countries designating a carrier granted antitrust immunity, or renewal thereof, for participation in similar alliance activities with a U.S. carrier;

4. We direct Deutsche Lufthansa, A.G. d/b/a Lufthansa German Airlines, and their subsidiaries, to report full-itinerary Origin-Destination Survey of Airline Passenger Traffic for all passenger itineraries that include a United States point (similar to the O&D Survey data already reported by its alliance partner United Air Lines, Inc.);

5. We direct United Air Lines, Inc. and Deutsche Lufthansa, A.G. d/b/a Lufthansa German Airlines, and their subsidiaries, to obtain prior approval from the Department if they choose to operate under a common name or use "common brands";

6. Except as described in Appendix B, we grant United Air Lines, Inc.'s motion for confidential treatment dated February 29, 1996, and Deutsche Lufthansa, A.G. d/b/a Lufthansa German Airlines motion for confidential treatment dated March 11, 1996;

7. We direct United Air Lines, Inc. and Deutsche Lufthansa, A.G. d/b/a Lufthansa German Airlines to file in the public docket for this proceeding the materials for which we have not granted confidential treatment, as described in Appendix B, within 5 business days of the date of service of this Order, unless, within that time, the submitter(s) seeks judicial review of this aspect of this Order, or submits a written statement expressing its interest to do so;

8. We delegate to the Director, Office of International Aviation, the authority to determine the applicability of the directive set forth in ordering paragraph 3, above, and further described in Order 96-5-12, footnote 57, to specific prices, markets, and tariff coordination activities, consistent with the scope and purpose of the condition as set heretofore described;

9. We direct United Air Lines, Inc. and Deutsche Lufthansa, A.G. d/b/a Lufthansa German Airlines to submit any subsequent subsidiary agreement(s) implementing the Expansion Agreement for prior approval;

10. This order is effective immediately; and

11. We shall serve this order on all persons on the service list in this docket.

By:

CHARLES A. HUNNICUTT
Assistant Secretary for Aviation
and International Affairs

(SEAL)

An electronic version of this document
will be made available on the World Wide Web at:
http://www.dot.gov/dotinfo/general/orders/aviation.html

CONDITIONS GOVERNING THE ANTITRUST IMMUNITY FOR THE ALLIANCE EXPANSION AGREEMENT BETWEEN UNITED AIR LINES, INC. AND DEUTSCHE LUFTHANSA A.G. d/b/a LUFTHANSA GERMAN AIRLINES

Grant of immunity

The Department grants immunity from the antitrust laws to United Air Lines, Inc. and Deutsche Lufthansa A.G., and their affiliates, for the Alliance Expansion Agreement dated January 9, 1996, between United Air Lines, Inc. and Deutsche Lufthansa A.G. and for any agreement incorporated in or pursuant to the Alliance Expansion Agreement.

Limitations on immunity

The foregoing grant of antitrust immunity shall not extend to the following activities by the parties: pricing, inventory or yield management coordination, or pooling of revenues, with respect to local U.S.-point-of-sale passengers flying nonstop between Chicago/Frankfurt and Washington/Frankfurt, or provision by one party to

the other of more information concerning current or prospective fares or seat availability for such passengers than it makes available to airlines and travel agents generally.

Exceptions to limitations on immunity

Despite the foregoing limitations, antitrust immunity shall extend to the joint development, promotion or sale by the parties of the following discounted fare products with respect to local U.S.-point -of-sale passengers flying nonstop between Chicago/Frankfurt and Washington/Frankfurt: corporate fare products; consolidator/wholesaler fare products; promotional fare products; group fare products; and fares and bids for government travel or other traffic that either party is prohibited by law from carrying on service offered under its own code. For immunity to apply, however: (i) in the case of corporate fare products and group fare products, local U.S. point-of-sale non-stop Chicago/Frankfurt and Washington/Frankfurt traffic shall constitute no more than 25% of a corporation's or group's anticipated travel (measured in flight segments) under its contract with United and Lufthansa; and (ii) in the case of consolidator/wholesaler fare products and promotional fare products, the fare products must include similar types of fares for travel in at least 25 city-pairs in addition to Chicago/Frankfurt and/or Washington/Frankfurt.

Definitions for purposes of this Order

"Corporate fare products" means the offer of non-published fares at discounts from the otherwise applicable tariff prices to corporations or other entities for authorized travel, which discounts may be stated as percentage discounts from specified published fares, not prices, volume discounts, or other forms of discount.

"Consolidator/wholesaler fare products" means the offer of non-published fares at discounts from the otherwise applicable tariff prices to (i) consolidators for sale by such consolidators to members of the general public either directly, or through travel agents or other intermediaries, at prices to be decided by the consolidator, or (ii) wholesalers for sale by such wholesalers as part of tour packages in which air travel is bundled with other travel products, which discounts, in either case, may be stated either as net prices due the parties on sales by such consolidator or wholesaler, or as percentage commissions due the consolidator or wholesaler on such sales.

"Promotional fare products" means published fares that offer directly to the general public for a limited time discounts from previously published fares having similar travel restrictions.

"Group fare products" means the offer of non-published fares at discounts from the otherwise applicable tariff prices for the members of an organization or group to travel from multiple origination points to a single destination to attend an identified special event, which discounts may be stated either as percentage discounts from specified published fares or net prices.

Clarification of scope of limitation on immunity

Under no circumstances shall the limitations on antitrust immunity set forth above be construed to limit the parties' antitrust immunity for activities jointly undertaken pursuant to the Alliance Expansion Agreement other than as specifically set forth in this Order. Immunized activities include, without limitation: decisions by the parties regarding the total number frequencies and types of aircraft to operate on the Chicago/Frankfurt and Washington/Frankfurt routes, and the configuration of such air-craft; coordination of pricing, inventory and yield management, and pooling of revenues, with respect to non-local passengers traveling on nonstop flights on the Chicago/Frankfurt and Washington/Frankfurt routes; and the provision by one party to the other of access to its internal reservations system to the extent necessary for use exclusively in checking-in passengers or making sales to or reservations for the general public at ticketing or reservations facilities.

Review of limitations on immunity

Within eighteen months from the date that this Order becomes final, or at any time upon application of the parties, the Department will review the limitations on antitrust immunity set forth above to determine whether they should be discontinued or modified in light of: current competitive conditions in the Chicago/Frankfurt and Washington/ Frankfurt city pairs; the efficiencies to be achieved by the parties from further integration that would be made possible by discontinuation of the limitations on immunity, when balanced against any potential for harm to competition from such a discontinuation; regulatory conditions applicable to competing alliances; or other factors that the Department may deem appropriate.

DOCUMENTS DENIED CONFIDENTIAL TREATMENT

United Air Lines, Inc.

1. 1994 Media Spending;
2. 1994 Airline Spending Percent by Medium-Germany;
3. Lufthansa/United Airlines Alliance;
4. Market Share "U.S. domestic flights" of UA on LH CHIFRA;
5. Lufthansa Passengers to MSP; and
6. Examples: Where are we now?

Deutsche Lufthansa, A.G. d/b/a Lufthansa German Airlines

1. Lufthansa/United Airlines Alliance;
2. Market Share "U.S. domestic flights" of UA on LH CHIFRA;
3. Code-Share Points, Details from UA/November 1995;
4. Inneramerikanische Orte via ORD, IAD, SFO, DFW, ATL, BOS, LAX, IAD;
5. Angebote (11 pages);
6. Codesharing-Dienste (5 pages); and
7. Business Travelers' Attributes and Characteristics (11 pages).